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Attorneys for Defendants/Appellants

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IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 09-0602

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JOSEPH T. BERLIN and MARTHA M. BERLIN,

Plaintiffs and Appellees,

-v-

MAGNOLIA ENTERPRISES, LLC, COLBERT P. HOWELL, BARBARA J. HOWELL, NORTHWEST ACCEPTANCE CORP., BARBARA JEAN HOWELL as TRUSTEE of the REVOCABLE INTERVIVOS VIRGINIA-BELL NEILSON TRUST, and DENNIS DeVAR NEILSON,

Defendants and Appellants.

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**APPELLANTS' JOINT MOTION FOR EMERGENCY STAY OF  
EXECUTION OF FORECLOSURE AND SALE**

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COME NOW, the Defendants, Magnolia Enterprises, LLC, Colbert P. Howell, Barbara J. Howell, Barbara Jean Howell as Trustee of the Revocable Intervivos Virginia-Bell Neilson Trust, and Dennis DeVar Neilson, jointly, by and through their respective counsel of record, William K. VanCanagan, of the law firm of Datsopoulos, MacDonald & Lind, P.C., and David H. Bjornson, of Bjornson Law Offices, P.C., and hereby respectfully move this Honorable Court for an order staying the foreclosure and associated sheriff's sale in the above-entitled cause of action.

### FACTUAL BACKGROUND

On October 5, 2009, this Court issued an Opinion and Order granting the motion for summary judgment filed by the plaintiffs, Joseph and Martha Berlin, in this foreclosure action. A Decree of Foreclosure and Order of Sale was subsequently entered on October 23, 2009. On November 10, 2009, Defendant DeVar Neilson filed a Brief in Support of his M.R.Civ.P. 59(g) Motion to Alter or Amend Judgment. That same day, Plaintiffs filed a Praecipe for the sheriff's sale. On November 13, 2009, Defendants filed a Joint Notice of Appeal to the Montana Supreme Court. The sheriff's sale is currently scheduled for TODAY, January 6, 2010, at 10:00 a.m.

On December 23, 2009, the parties appeared in front of the Honorable Edward McLean, District Judge, to address the status of several matters, including the pending M.R.Civ.P. 59(g) Motion to Alter or Amend Judgment, and their Joint Motion for Stay of Execution of Foreclosure and Sale before that Court, and the Court stated from the bench during such hearing that the entire file had been transferred to the Montana Supreme Court pending the hearing, and that therefore he had no jurisdiction to rule on either motion, and only retained jurisdiction to set the supersedeas bond. **The District Court declined to rule on either motion, thus resulting in the Appeal proceeding without even the consideration of the Motion for Stay of Execution of Foreclosure and Sale.**

Just yesterday, on January 5, 2010, the bonding company declined the initial bond application, and the parties have been working furiously to arrange additional collateral and pledgors and credit enhancements to facilitate the bond. However, the sheriff's sale is pending at 10:00 a.m. this morning.

A sale is pending with respect to substantial property owned by Appellant Magnolia Enterprises, LLC and/or the Howells, the closing of which is scheduled

for January 15, 2010. The proceeds of this sale would in fact payoff all amounts owed under the instruments which underpin this foreclosure. While there is no assurance that this transaction will close, whether it does or not, Appellee's rights are protected.

The case is positioned in the awkward status of the Appeal to the Supreme Court having been required to be filed by approximately the identical date to the M.R.Civ.P. 59(g) Motion to Alter or Amend Judgment, and their Joint Motion for Stay of Execution of Foreclosure and Sale, and, thus, the District Court elected to forego any rulings on those motions, leaving same to the Montana Supreme Court.

The land involved is not moving anywhere, and the Appellees' property rights are not endangered by a Stay of Execution of Foreclosure and Sale Pending Appeal.

In the meantime, a bond will be secured through the marshalling of additional collateral by all party Appellants and, furthermore, the loan which is the subject of this foreclosure will very possibly be paid in full within thirty (30) days of the date hereof.

A Sheriff's sale will irrevocably cause the loss of Appellant Dennis Neilson's inheritance under his (and Barbara Howell's) mother's estate plan.

### **ARGUMENT**

#### **I. DEFENDANTS ARE ENTITLED TO A STAY OF EXECUTION OF FORECLOSURE AND SALE PENDING APPEAL.**

The Defendants are entitled to a stay of execution of foreclosure and sale pending this Honorable Court's ruling on their M.R.Civ.P. 59(g) Motion to Alter or Amend Judgment and any subsequent appeal to the Montana Supreme Court. M.R.App.P. 22 provides in pertinent part:

**Stay of judgment or order pending appeal.** (1) Motion for stay in district court. (a) A party shall file a motion in the district court for any of the following relief: (i) To stay judgment or order of the district court pending appeal.

M.R.App.P. 22 further sets forth the proper procedure for seeking a stay of execution as follows:

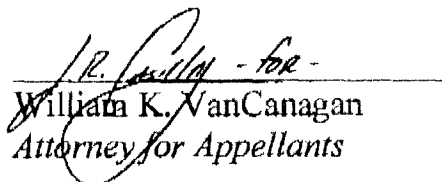
(b) If the appellant desires a stay of execution, the appellant must, unless the requirement is waived by the opposing party, obtain the district court's approval of a supersedeas bond which shall have 2 sureties or a corporate surety as may be authorized by law. The bond shall be conditioned for the satisfaction of the judgment or order in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment or order is affirmed, and to satisfy in full such modification of the judgment or order and such costs, interest, and damages as the supreme court may adjudge and award... When the judgment or order *determines the disposition of property in controversy as in real actions, replevin, and actions to foreclose mortgages*, or when such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the district court, the amount of supersedeas bond *shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.* (emphases added).

Myriad decisions of the Montana Supreme Court make clear that a party confronted with judgment ordering foreclosure sale and who allows foreclosure sale to proceed runs the risk that the appeal will thereby be rendered moot. *Turner v. Mountain Engineering and Construction, Inc.*, 276 Mont. 55, 63, 276 P.2d 799, 804 (1996), see also *Martin Dev. Co. v. Keeney Co.*, 216 Mont. 212, 220, 703 P.2d 143, 147-48 (1985). As has long been recognized, there is a special need for seeking a stay when the sale of property is ordered and is not enjoined. *Turner*, 276 Mont. at 63, 915 P.2d 799, 804.

Here, the property subject to foreclosure sale is not enjoined and Defendants justifiably now seek a stay of execution pending this Honorable Court's ruling on their M.R.Civ.P. 59(g) Motion to Alter or Amend Judgment and the disposition of any subsequent and associated appellate issues to the Montana Supreme Court. A premature foreclosure sale would clearly render any favorable rulings on appeal moot.

**WHEREFORE**, Defendants hereby respectfully jointly move this Honorable Court for an order staying the execution of the foreclosure sale pending its ruling on Defendants M.R.Civ.P 59(g) Motion and subsequent appeal to the Montana Supreme Court.

DATED this 6<sup>th</sup> day of January, 2010.

  
William K. VanCanagan  
Attorney for Appellants

**CERTIFICATE OF SERVICE**

I, the undersigned, an employee of Datsopoulos, MacDonald & Lind, P.C., hereby certify that a true and correct copy of the foregoing was mailed or faxed, postage prepaid, this 6<sup>th</sup> day of January, 2010, to the following:

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By: 

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 09-0602

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JOSEPH T. BERLIN and MARTHA M. BERLIN,

Plaintiffs and Appellees,

-v-

MAGNOLIA ENTERPRISES, LLC, COLBERT P. HOWELL, BARBARA J. HOWELL, NORTHWEST ACCEPTANCE CORP., BARBARA JEAN HOWELL as TRUSTEE of the REVOCABLE INTERVIVOS VIRGINIA-BELL NEILSON TRUST, and DENNIS DeVAR NEILSON,

Defendants and Appellants.

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**ORDER GRANTING STAY OF EXECUTION  
OF FORECLOSURE AND SALE**

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Upon Defendant's motion, with good cause appearing,

IT IS HEREBY ORDERED that foreclosure proceedings and the sheriff's sale currently scheduled for the 6<sup>th</sup> day of January, 2010 are stayed pending the Montana Supreme Court's ruling on Defendants' joint appeal.

DATED this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

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Supreme Court Justice

cc: Brian J. Smith  
Kathryn S. Mahe  
GARLINGTON, LOHN & ROBINSON, PLLP

Richard Buley  
TIPP & BULEY

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